

**Merit Systems Protection Board**  
**Annual Report**  
**FY 2003**



**August 2004**

## **FOREWORD**

In accordance with section 1206 of Title 5 United States Code, the Merit Systems Protection Board provides this annual report on the significant actions of the Board. This report includes a discussion of the most significant Board and court decisions issued during the fiscal year, FY 2003 case processing statistics, a summary of the Board's merit systems studies activities, and a summary of financial results. Additional information including performance results and financial audit information is included in our Performance and Accountability Report (PAR) for FY 2003.

The significant actions taken by the Board during FY 2003 were taken under then Chairman Susanne T. Marshall. In December of 2003, Neil A.G. McPhie was designated by the President as Vice Chairman, thus Acting Chairman of the Merit Systems Protection Board. This Annual Report has been prepared under the leadership of Acting Chairman McPhie.

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## **Merit Systems Protection Board FY 2003 Annual Report**

### **FISCAL YEAR 2003 IN REVIEW**

#### **Increased Flexibility in Human Capital Management and the Board's Role in Protecting the Merit System**

In the past year, the most significant trend affecting the civil service was the accelerated movement away from traditional civil service processes toward more flexibility in human capital management. Since the mid-1990s, several Cabinet departments or agencies within them have developed alternative human capital management systems which included significant statutory exemptions from traditional civil service laws and regulations. This trend toward flexibility increased markedly with the enactment of statutory authorities for the Department of Homeland Security (DHS) and the Department of Defense (DoD) to establish alternative personnel systems. When the DHS and DoD systems are fully implemented, almost 1 million Federal employees -- well over half of the Federal workforce -- will be managed under alternative systems which may differ significantly from the traditional civil service system.

Most of the agency-specific human capital management flexibilities enacted in earlier years have concentrated on exemptions from laws, regulations and rules governing hiring, classification, and pay. With the exception of the Federal Aviation Administration (FAA), employees in agencies that obtained personnel flexibilities did not lose their right to appeal major adverse personnel actions to the Merit Systems Protection Board (herein after referred to as MSPB or the Board). Even in the FAA, the MSPB appeal rights were restored by Congress just four years later. Under the legislation authorizing DHS and DoD to establish alternative personnel systems, however, each is free to establish an internal appeals process. The statutory authority for DHS does not require any participation by MSPB in the appeals process, while the DoD authority mandates only a limited appellate review role for the Board.

While both DHS and DoD are expected to use their statutory authorities to establish unique rules for processing appeals of adverse actions, it is not certain that either will establish an internal appeals process. The laws authorizing their alternative personnel systems leave sufficient flexibility for the departments to remain with MSPB and to have the appeals filed by their employees adjudicated under a unique set of rules developed by each department.

Where the Board's other statutory mission—merit systems studies—is concerned, it appears that there will be an even greater need for studies of the operation of these new personnel systems to ensure that they are operating in accordance with merit system principles and free of prohibited personnel practices. The DHS and DoD personnel authorities, like the personnel flexibilities granted to other agencies in recent years, provide that the Title 5 provisions governing merit system principles and prohibited personnel practices may not be waived, modified, or otherwise affected. Therefore, as agency-specific merit systems spread in the Federal Government, the

extent to which those systems adhere to merit principles and deter prohibited personnel practices will become an important standard by which the operation of those systems can be measured.

Most observers agree that with more than half of the employees in the Executive Branch working under merit systems with significant exemptions from Title 5, other agencies will soon seek, and perhaps obtain, the same kinds of personnel flexibilities that DoD, DHS, and others have already gained. The challenge for the Board is to preserve its role as chief protector of Federal merit systems in the 21<sup>st</sup> century civil service that is being developed. The Board will maintain that role, of course, only to the extent that Congress provides for it in legislation granting Title 5 exemptions to agencies or to the extent that those agencies elect to remain in the MSPB appeals system.

### **Board and Senior Staff Changes**

Susanne T. Marshall was Chairman of the Merit Systems Protection Board during FY 2003, having been appointed to that position by President Bush on August 6, 2002. She had served as Acting Chairman of the Board since February 7, 2002, when President Bush designated her Vice Chairman. (Under the Board's governing statute, the Vice Chairman serves as Acting Chairman when the position of Chairman is vacant.) Member Beth S. Slavet retired from the Board on March 1, 2003. (Although Ms. Slavet's term expired on March 1, 2002, she stayed on under the provision of the Board's governing statute that allows a member to serve for up to one year beyond the expiration date of her term or until a successor is confirmed, whichever occurs first.) From March 1, 2003 until April 23, 2003, Chairman Marshall was the only member of the Board. During this time, because there was no quorum -- consisting of at least two out of three members -- no Board decisions could be issued. However, regional decisions by administrative judges continued to be issued during this time. On April 23, 2003, Neil A.G. McPhie was appointed by President Bush to serve as a member of the Board. Chairman Marshall and Member McPhie served together during the remainder of FY 2003.

Relatively early in FY 2003, Chairman Marshall appointed two employees with years of Board adjudicatory and legal experience as the General Council and as the Director of the Office of Appeals Counsel. In addition, the Director of the Office of Finance and Management retired in FY 2003. At the end of FY 2003, that office was being managed by an Acting Director.

### **Adjudication of Cases**

During FY 2003, the Board continued to address the full range of both substantive and procedural issues that arise in the matters over which it has jurisdiction. The Board issued significant decisions involving constructive removal of an administrative law judge, the Whistleblower Protection Act of 1989 and the Veterans Employment Opportunities Act of 1998. The Board also issued decisions that applied a flexible concept of constitutional due process, discussed when attorney fees should be awarded, sustained an agency action taken under performance standards developed for a demonstration project, clarified the circumstances under which an agency demotes an employee by reduction in force, reversed a prior holding that the Office of Personnel Management is bound by the terms of a settlement agreement to which it was not a party, and explained when a survivor annuity can be paid to a full-time student who does not attend classes in a school building. The section of this report titled "Significant Judicial

and Board Decisions Issued in FY 2003" provides a discussion of the most significant Board and court decisions issued during the fiscal year.

The Mediation Appeals Project (MAP) continued in FY 2003. Under this program, the parties to an appeal filed with an MSPB regional or field office are offered the opportunity to submit their dispute to a trained mediator. If the dispute cannot be resolved through that mediation, the appeal is returned to the regular adjudication process. The MAP is a supplement to, not a replacement for, the Board's existing settlement program. The first year results of the MAP were evaluated and a formal pilot program was initiated. Late in the fiscal year, the responsibility for continuing implementation of the MAP was transferred from headquarters to the Regional Directors of the Atlanta and Central Regional Offices.

Considerable progress was made during FY 2003 on streamlining the Board's procedures, and on implementing the Board's new electronic case management system. In addition, implementing an electronic appeals process – e-Appeal – and the revised regulations authorizing electronic filing constituted Board compliance by the statutory deadline of October 23, 2003.

### **Merit Systems Studies**

During FY 2003, the Board issued three reports of merit systems studies conducted by the Office of Policy and Evaluation. These reports were based on new studies and covered Federal vacancy announcements, the use of structured selection interviews, and results of the Merit Principles Survey 2000. The Board continued to look at the significant actions of the Office of Personnel Management as required by statute. The Board also issued three editions of the OPE newsletter during FY 2003. Newsletter topics included discussions of merit systems values, advocacy of specific human capital management reform efforts, practical advice for human resources specialists, specific analyses of ongoing studies and informational articles on contemporary merit system topics. The section of this report titled "Summary of Merit Systems Studies Function" provides additional information including a review of study findings and recommendations.

The OPE staff continued to serve as a valuable resource for the Board in meeting internal agency needs by performing the initial assessment of the Mediation Appeals Program (MAP). Upon retirement of the Director of Finance and Management, OPE took on the responsibility for the human resources functions of the Board. In addition, OPE began working on the Board's Government Performance and Results Act requirements with full responsibility for those requirements set to occur in FY 2004.

### **Legislation**

The two most significant legislative enactments for the Board that occurred during fiscal year 2003 (reauthorization of the Board and passage of the Homeland Security Act of 2002) were included in the Board's annual report for fiscal year 2002. The Board's reauthorization was enacted as Public Law No. 107-304 on November 27, 2002. It was included in a bill that authorizes certain employees to make catch-up contributions to the Thrift Savings Plan. The new Department of Homeland Security (DHS) was created by the Homeland Security Act that was enacted as Public Law No. 107-296 on November 25, 2002. Because of the significant impact

the Homeland Security Act may have on the Board's adjudicatory function, we are providing an update on developments resulting from this statute since its passage.

The Homeland Security Act authorized the Secretary of DHS and the Director of the Office of Personnel Management to issue regulations establishing a separate human resources management system. This includes the authority to establish a separate employee appeals system. The Act requires the Secretary of Homeland Security and the OPM Director to consult with the Board prior to issuing regulations to ensure that the appeals systems affords due process protections to DHS employees.

The Board established a working group comprised of several managers and senior attorneys to fulfill this statutory responsibility. The working group worked with officials and other representatives from DHS and OPM for over a year. The proposed regulations were published in Volume 69, No. 34 of the Federal Register on February 20, 2004, and may be found in 5 C.F.R. Part 9701. The employee appeals system established pursuant to these regulations retains MSPB appeal rights for DHS employees at the regional and petition for review levels for most adverse employment actions. Some of the significant changes reflected in the new system include: 1) shorter deadlines for filing appeals and issuing decisions; 2) a lower standard of proof that the Department must meet in cases of alleged employee misconduct from "preponderance of the evidence" to "substantial evidence"; 3) elimination of the Board's authority to mitigate penalties; 4) authorization of the Secretary to designate certain conduct as "mandatory removal offenses"; and 5) establishment of an internal appeals process for mandatory removal offenses.

The deadline for comments on the proposed regulations was March 22, 2004. The Department expects to issue final regulations by the fall of this year.

### **Significant Actions of the Office of Personnel Management**

As required by statute, MSPB reports on the significant actions of the Office of Personnel Management. In this report, we report on and analyze the significance of actions with the greatest long-term implications for the Federal civil service: its lead role in designing the new personnel systems for the Department of Homeland Security and the Department of Defense; its broader focus on agency human capital management; its leadership in electronic government initiatives, including Recruitment One-Stop and the Enterprise Human Resources Integration initiative; its oversight actions to assure agency compliance with law and regulations; its role in increasing the scope of Governmentwide efforts to identify and develop candidates for leadership positions in the Federal service; and its support for development of pay-for-performance remuneration systems.

## **BOARD MEMBERS**

### **Chairman**



**SUSANNE T. MARSHALL** was appointed by President Bush on August 6, 2002, to serve as Chairman of the Merit Systems Protection Board. She had served as Acting Chairman of the Board since February 7, 2002, when President Bush designated her Vice Chairman. (Under the Board's governing statute, the Vice Chairman serves as Acting Chairman when the position of Chairman is vacant.) She has been a member of the Board since November 17, 1997, following her nomination by President Clinton and confirmation by the Senate. From December 1985 until her appointment to the Board, she served on the Republican staff of the Committee on Governmental Affairs of the United States Senate as both Professional Staff and Deputy Staff Director. While on the committee staff, she was responsible for a variety of legislative issues under the committee's jurisdiction, including Federal workforce policies, civil service matters, and postal issues. From 1983 to 1985, she was Republican Staff Assistant to the House Government Operations Committee. She was Legislative Assistant to a Member from Georgia from 1981 to 1982. Ms. Marshall attended the University of Maryland branch campus in Munich, Germany, and the American University.



**Member**



**NEIL A.G. McPHIE** was appointed by President Bush to serve as a member of the Merit Systems Protection Board on April 23, 2003. Prior to joining the Board, he was Senior Assistant Attorney General in the Office of the Attorney General of Virginia. Among other responsibilities, he defended employment discrimination claims brought under Federal law and wrongful discharge claims brought under state law. Previously, he was Executive Director of the Virginia Department of Employment Dispute Resolution (EDR). In that position, he directed implementation of EDR's statewide grievance, mediation, training and consultation programs. He was an Assistant Attorney General in the Office of the Attorney General of Virginia from 1982 to 1988. From 1976 until he joined the Attorney General's Office, he was a Trial and Appellate Attorney in the Office of the General Counsel at the U.S. Equal Employment Opportunity Commission. He received his J.D. degree from Georgetown University Law Center in 1976. He received a B.A. in Economics from Howard University in 1973, graduating magna cum laude. He is a member of Phi Beta Kappa. He is admitted to the bars of the District of Columbia, Virginia, New York and Iowa, the United States Supreme Court, the United States District Court for the District of Columbia, several of the United States circuit courts of appeals, and district courts in Virginia.

**Member**

The third position on the Board was vacant throughout FY 2003.

The bipartisan Board consists of a Chairman, a Vice Chairman, and a Member, with no more than two of its three members from the same political party. Board members are appointed by the President, confirmed by the Senate, and serve overlapping, non-renewable 7-year terms.

## **BOARD ORGANIZATION**

The **Board Members** adjudicate the cases brought to the Board. The **Chairman**, by statute, is the chief executive and administrative officer of the Board. Office heads report to the Chairman through the Chief of Staff.

The **Office of Regional Operations (ORO)** oversees the ten MSPB regional and field offices, which receive and process appeals and related cases. Administrative judges in the regional and field offices are responsible for adjudicating assigned cases and for issuing fair and well-reasoned initial decisions.

The **Office of the Administrative Law Judge (ALJ)** adjudicates and issues initial decisions in corrective and disciplinary action complaints (including Hatch Act complaints) brought by the Special Counsel, proposed agency actions against administrative law judges, MSPB employee appeals, and other cases assigned by the Board. (The functions of this office are currently performed by administrative law judges at the National Labor Relations Board under an interagency agreement.)

The **Office of Appeals Counsel (OAC)** conducts legal research and prepares proposed decisions for the Board in cases where a party petitions for review of a judge's initial decision and in most other cases decided by the Board. The office conducts the Board's petition for review settlement program, prepares proposed decisions on interlocutory appeals of rulings made by judges, makes recommendations on reopening cases on the Board's own motion, and provides research and policy memoranda to the Board on legal issues.

The **Office of the Clerk of the Board (OCB)** receives and processes cases filed at Board headquarters, rules on certain procedural matters, and issues the Board's decisions and orders. The office serves as the Board's public information center, coordinates media relations, produces public information publications, operates the Board's Library and on-line information services, and administers the Freedom of Information Act and Privacy Act programs. The office also certifies official records to the courts and Federal administrative agencies, and manages the Board's records and directives systems, legal research programs, and the Government in the Sunshine Act program.

The **Office of the General Counsel (OGC)**, as legal counsel to the Board, provides advice to the Board and MSPB offices on matters of law arising in day-to-day operations. The office represents the Board in litigation, prepares proposed decisions for the Board on assigned cases, and coordinates the Board's legislative policy and congressional relations functions. The office also drafts regulations, conducts the Board's ethics program, and plans and directs audits and investigations.

The **Office of Policy and Evaluation (OPE)** carries out the Board's statutory responsibility to conduct special studies of the civil service and other merit systems. Reports of these studies are directed to the President and the Congress and are distributed to a national audience. The office responds to requests from Federal agencies for information, advice, and assistance on

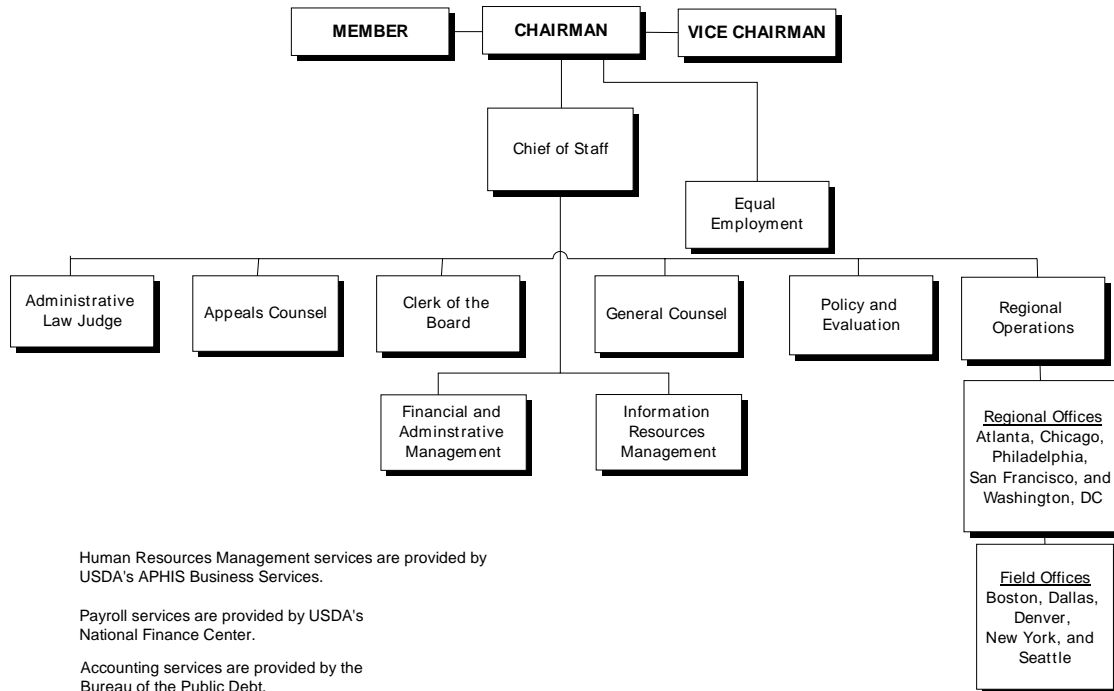
issues that have been the subject of Board studies. The office also provides oversight of the agency's human resources management function and administers the cross-servicing agreement with the U.S. Department of Agriculture's APHIS Business Services for human resources management services.

The **Office of Equal Employment Opportunity (EEO)** plans, implements, and evaluates the Board's equal employment opportunity programs. It processes complaints of alleged discrimination and furnishes advice and assistance on affirmative action initiatives to the Board's managers and supervisors.

The **Office of Financial and Administrative Management (FAM)** administers the budget, procurement, property management, physical security, and general services functions of the Board. It develops and coordinates internal management programs and projects, including review of internal controls agencywide. It also administers the agency's cross-servicing agreements with the U.S. Department of Agriculture's National Finance Center for payroll services and the Department of the Treasury's Bureau of the Public Debt for accounting services.

The **Office of Information Resources Management (IRM)** develops, implements, and maintains the Board's automated information systems to help the Board manage its caseload efficiently and carry out its administrative and research responsibilities.

### Merit Systems Protection Board



## **SIGNIFICANT BOARD DECISIONS ISSUED IN FISCAL YEAR 2003 WITH RELATED OPINIONS ISSUED BY THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

In FY 2003, the Merit Systems Protection Board issued several significant decisions. Some of these decisions are particularly noteworthy because they changed or clarified existing case law. In its decisions, the Board attempted to follow the plain language of the applicable statutes, as well as the legislative intent. It also tried to take a common sense, practical approach to deciding the issues presented to it.

This summary begins with a case in which the Board reexamined long-standing precedent on what constitutes a constructive removal of an administrative law judge. The summary then discusses cases interpreting the Whistleblower Protection Act of 1989 and the Veterans Employment Opportunities Act of 1998. The summary concludes with a discussion of Board decisions that applied a flexible concept of constitutional due process, discussed when attorney fees should be awarded, sustained an agency action taken under performance standards developed for a demonstration project, clarified the circumstances under which an agency demotes an employee by reduction in force, reversed a prior holding that the Office of Personnel Management is bound by the terms of a settlement agreement to which it was not a party, and explained when a survivor annuity can be paid to a full-time student who does not attend classes in a school building.

In its 1985 decision in *In re Doyle*, 29 M.S.P.R. 170 (1985), the Board created a theory that an administrative law judge (ALJ) could be “constructively” removed even though he still held the position of ALJ. The *Doyle* theory held that even though an ALJ still occupied an ALJ position, he could be “constructively” removed if the agency interfered with his qualified judicial independence. The Board reexamined that theory in *Tunik v. Social Security Administration*, 93 M.S.P.R. 482 (July 27, 2003).

In *Tunik*, the Board started with the plain meaning of the term “removal” in 5 U.S.C. § 7521, which governs the procedures that an agency must follow before removing an ALJ. The Board applied the relevant rules of statutory construction and harmonized the term “removal” in section 7521 with the way that the term “removal” has been interpreted in 5 U.S.C. § 7512, which applies to employees other than ALJs. In so doing, the Board concluded that it does not have jurisdiction over a removal or “constructive” removal of an ALJ unless the ALJ has been separated or involuntarily reassigned from the position of ALJ. The Board thus overruled *Doyle*.

In FY 2003, the Board issued four opinions of particular interest regarding the Whistleblower Protection Act (WPA). The Board in *White v. Department of the Air Force*, 95 M.S.P.R. 1 (2003), looked at the plain meaning of the statute to determine the legal standard for ascertaining whether an appellant had a reasonable belief that he made a protected disclosure. The Board found that the statute does not include a requirement that an appellant provide “irrefragable proof” to rebut a presumption that agency officials perform their duties correctly, fairly, in good faith, and in accordance with law and regulations. Thus, the Board found that any

statement to the contrary in the opinion issued by the United States Court of Appeals for the Federal Circuit in *Lachance v. White*, 174 F.3d 1378 (Fed. Cir. 1999), was dictum.

The Board went on in *White* to state that the test for determining reasonable belief is an objective one. The test is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the appellant could reasonably have concluded that the agency's actions constituted gross mismanagement. Applying this test, the Board found that Mr. White did not prove that he had a reasonable belief that agency officials grossly mismanaged a quality education program.

In *Greenspan v. Department of Veterans Affairs*, 94 M.S.P.R. 247 (Sept. 15, 2003), the Board further clarified its decision in *Rusin v. Department of the Treasury*, 92 M.S.P.R. 298 (2002). It did so by stating that an appellant establishes the Board's jurisdiction over his individual right of action (IRA) appeal if he shows that he exhausted his Special Counsel remedy and, irrespective of how many protected disclosures and personnel actions are alleged, he makes a nonfrivolous allegation that he made at least one protected disclosure which was a contributing factor in at least one personnel action.

The Board in *Berkowitz v. Department of the Treasury*, 94 M.S.P.R. 658 (2003), reversed the administrative judge's finding of lack of jurisdiction over the IRA appeal. The Board found that the appellant made a non-frivolous allegation that he had a reasonable belief of a violation of law when he reported that the agency was improperly spending appropriated funds and misleading Congress.

The Board in *Czarkowski v. Department of the Navy*, 93 M.S.P.R. 514 (July 7, 2003), agreed with the administrative judge that the appellant was exempt from coverage under the WPA. This was so because the evidence showed that the organizational unit in which she worked had been determined by the President, or his designee, to have as its principal function "the conduct of foreign intelligence or counterintelligence activities." Since the statute at 5 U.S.C. § 2302(a)(2)(C)(ii) excludes employees who work in such units from coverage under the WPA, the Board lacked jurisdiction over the appellant's IRA appeal. In response to a concern that the Board's decision would "damage national security" by silencing whistleblowers, the Board noted the clear language of the statute and the fact that Congress has provided whistleblower protection to employees not covered by the WPA by enacting laws such as the 1998 Intelligence Community Protection Act.

In FY 2003, the Board issued a trio of significant cases involving the Veterans Employment Opportunities Act (VEOA). The Board in *Abrahamsen v. Department of Veterans Affairs*, 94 M.S.P.R. 377 (Sept. 23, 2003), clarified the jurisdictional test for VEOA cases. There, the Board said that it has jurisdiction over a VEOA appeal if the appellant (1) shows that he exhausted his remedy with the Department of Labor, and (2) makes nonfrivolous allegations that (i) he is a preference eligible within the meaning of the VEOA statute, (ii) the action(s) at issue took place on or after the October 30, 1998, enactment date of VEOA, and (iii) the agency violated his rights under a specific statute or regulation relating to veterans' preference.

The two other VEOA cases—*Waddell v. U.S. Postal Service*, 94 M.S.P.R. 411 (Sept. 24, 2003), and *Williams v. Department of the Navy*, 94 M.S.P.R. 400 (Sept. 24, 2003)—involved

issues of timeliness. The Board in *Waddell* found that no statute or regulation gives it the authority to review a decision by the Department of Labor (DOL) to waive the untimeliness of a VEOA complaint filed with the Secretary of Labor. Thus, if the DOL waives the untimeliness of a VEOA complaint and issues a decision on the merits, the appellant has exhausted his DOL remedy for purposes of establishing the Board's jurisdiction over his VEOA appeal.

The Board in *Williams* was faced with the question of whether the statute bars the Board's consideration of any VEOA appeal which is filed more than 15 days after the appellant receives notice from DOL that his DOL complaint could not be resolved. The VEOA statute at 5 U.S.C. § 3330a(d)(1) provides that "in no event" may a Board appeal be filed more than 15 days after the date on which the complainant receives written notice from DOL that it was unable to resolve his complaint. The Board held that the language in the statute is plain and allows for no circumstances under which a Board appeal can be filed later than the 15th day after the appellant receives the DOL notice.

The Board had an opportunity to discuss the concept of "due process" in *Rawls v. U.S. Postal Service*, 94 M.S.P.R. 614 (2003). There, the Board stated that due process is a flexible concept that depends on the nature of the case and the procedural protections required by the specific situation. In *Rawls*, although the agency did not issue a notice proposing to suspend the appellant before suspending him for his arrest on a charge of first-degree murder, it did afford him a post-suspension opportunity to grieve the suspension immediately. The agency also did not issue a notice proposing to remove the appellant for being convicted of a crime. Again, however, the agency offered the appellant a chance to file a grievance before the proposed removal was effected. The Board found that the appellant was given an opportunity to tell his side of the story, by filing a grievance, before the effective date of the removal, as well as a right, which he exercised, to file a Board appeal after the removal action was taken. Under those circumstances, the Board found that the agency did not deny the appellant minimum due process.

Entitlement to attorney fees was the issue in *Arnold v. Department of the Air Force*, 94 M.S.P.R. 17 (Aug. 6, 2003). The Equal Employment Opportunity Commission (EEOC) found that the appellant was a "prevailing party" for purposes of an award of attorney fees and sent the case back to the Board. The Board found that, at least in this case, it had to concur in EEOC's decision that, under discrimination law, the appellant was a "prevailing party." That did not end the inquiry, however. The Board still had to determine whether, under civil service law at 5 U.S.C. § 7701(g)(2), the appellant was entitled to fees. That statute gives the Board the same discretion as Federal district courts to decide whether an award of fees is reasonable under the circumstances. The circumstances in *Arnold* showed that the discrimination issue was conclusively decided before the appellant filed his Board appeal, and that the appellant received no more relief from the Board than he had received from his employing agency prior to filing a Board appeal. Given these facts, the Board held that the appellant was not entitled to attorney fees incurred in proceedings before the Board.

The appeal in *Guillebeau v. Department of the Navy*, 93 M.S.P.R. 379 (Mar. 28, 2003), involved performance standards created in an OPM-approved personnel demonstration project. The Board reversed the administrative judge's finding that the agency failed to prove that the appellant did not meet those performance standards. The Board noted that in establishing the



demonstration project, OPM allowed the agency to waive the requirement that it establish critical elements to measure an employee's performance. Rather, the appellant's performance was measured by "requirements and expectations" that apply to "organizational goals, strategies and values." The Board found that the agency proved that the appellant simply failed to complete her work assignments during the time that she was given to show acceptable performance. Thus, the appellant was properly removed.

On a somewhat related topic, the United States Court of Appeals for the Federal Circuit agreed with the Board in *Scarnati v. Department of Veterans Affairs*, 344 F.3d 1246 (Fed. Cir. Sept. 25, 2003), that the Department of Veterans Affairs has discretionary authority to appoint health care personnel under 38 U.S.C. § 7401(1) without regard to civil service requirements.

The appellants in the consolidated appeals in *Burger v. U.S. Postal Service*, 93 M.S.P.R. 582 (July 30, 2003) (*Burger II*), claimed that the Postal Service demoted them by reduction in force (RIF). The Board clarified its earlier decision in *Burger v. U.S. Postal Service*, 88 M.S.P.R. 579 (2001) (*Burger I*). It did so by relying on the Federal Circuit's decision in *Harants v. U.S. Postal Service*, 130 F.3d 1466 (Fed. Cir. 1997). The Board found that the court in *Harants* held that, to show a RIF demotion, an appellant must establish the following: (1) He bid to and accepted a lower-grade position after the agency actually informed him that his original position had in fact been abolished, and (2) his bid to and acceptance of the lower-grade position occurred after the agency expressly notified him that he would not be assigned to a position at the same grade as his former position. Finding that none of the appellants made the required showing, the Board dismissed all of their appeals for lack of jurisdiction.

Two months after the Board issued its opinion in *Burger II*, the Federal Circuit decided *Marcino v. U.S. Postal Service*, 344 F.3d 1199 (Fed. Cir. Sept. 22, 2003). The administrative judge in *Marcino* found that the appellant's acceptance of a level 5 position was voluntary because the appellant was never separated from his level 6 position, and he was not told that there was no possibility of reassignment to a new position at grade level 6. Chairman Marshall agreed with the administrative judge in the split-vote order in *Marcino v. U.S. Postal Service*, 93 M.S.P.R. 237 (Jan. 23, 2003). The court also agreed with the administrative judge, stating, as the Board had done in *Burger II*, that the Board does not have jurisdiction over an alleged RIF demotion unless the agency informed the employee that his position had been abolished and that he would not be reassigned to a position at the same grade level.

The Board decided two retirement appeals of particular note in FY 2003—*Parker* and *Seth-Morris*. The case of *Parker v. Office of Personnel Management*, 93 M.S.P.R. 529 (July 11, 2003), was before the Board on a request from the Office of Personnel Management that the Board reconsider its earlier decision to award the appellant an annuity. On reconsideration, the Board found that the appellant was not entitled to an annuity because OPM was not required to credit him with service time which his employing agency attempted to give him under a settlement agreement. In so finding, the Board overruled *Jordan v. Office of Personnel Management*, 77 M.S.P.R. 610 (1998), in which it had found that OPM is conclusively bound by the terms of a settlement agreement to which OPM was not a party. Rather, the Board held that OPM, as the administrator of the Retirement Fund, has the authority, subject to Board review, to refuse to give effect to a personnel action taken as a result of a settlement agreement when OPM

decides that the action is an artifice designed to evade the statutory requirements for entitlement to an annuity, which was the situation in this appeal.

In *Seth-Morris v. Office of Personnel Management*, 94 M.S.P.R. 166 (Sept. 9, 2003), the Board disagreed with OPM that the term “in residence in a high school” in 5 U.S.C. § 8341 means that a full-time student has to attend classes in a high school building to be entitled to survivor benefits. The student in *Seth-Morris* was enrolled full time in a fully accredited “alternative high school program” run by the county school system, had to pick up his assignments once a week and meet regularly with his teachers, but was allowed to complete his class work and assignments at home. The evidence showed that the student finished a regular high school course of study in the normal four years and graduated with the rest of his class. The Board found that, under these facts, Congress intended that the student receive full-time student survivor benefits even though he did not attend class in a school building. It therefore reversed OPM’s decision to deny the appellant’s application for a full-time student survivor annuity for her son.

## FY 2003 CASE PROCESSING STATISTICS

### SUMMARY OF CASES DECIDED BY MSPB IN FY 2003

<b>Cases Decided in MSPB Regional/Field Offices (RO)/FOs):</b>	
Appeals <sup>1</sup>	6,601
Addendum Cases <sup>2</sup>	514
Stay Requests <sup>3</sup>	112
<b>TOTAL Cases Decided in RO/FOs</b>	<b>7,227</b>
<b>Cases Decided by Administrative Law Judges (ALJs) – Original Jurisdiction Only <sup>4</sup></b>	<b>15</b>
<b>Cases Decided by the Board:</b>	
Appellate Jurisdiction:	
Petitions for Review (PFRs) – Appeals	973
Petitions for Review (PFRs) – Addendum Cases	117
Reviews of Stay Request Rulings	0
Requests for Stay of Board Order	5
Reopenings <sup>5</sup>	9
Court Remands	13
Compliance Referrals	28
EEOC Non-concurrence Cases	3
Arbitration Cases	4
Subtotal – Appellate Jurisdiction	1,152
Original Jurisdiction <sup>6</sup>	22
<b>TOTAL Cases Decided by the Board <sup>7</sup></b>	<b>1,174</b>
<b>TOTAL Cases Decided (Board, ALJs, RO/FOs)</b>	<b>8,416</b>

See next page for footnotes.

## **FOOTNOTES TO TABLE**

- 1 Includes 48 appeals decided at headquarters by Office of Regional Operations (ORO).
- 2 Includes 14 addendum cases decided at headquarters—10 by ORO and 4 by ALJs. Case type breakdown: 127 requests for attorney fee awards, 5 requests for compensatory damages (discrimination cases only), 280 petitions for enforcement, 83 Board remand cases, and 19 court remand cases.
- 3 Includes 70 stay requests in whistleblower cases and 42 in non-whistleblower cases.
- 4 Initial Decisions issued by ALJ. Case type breakdown: 2 OSC disciplinary actions (non-Hatch Act), 1 Hatch Act case, and 3 actions against ALJs; 4 requests for attorney fee awards and 2 petitions for enforcement in OSC disciplinary actions (non-Hatch Act); 1 petition for enforcement and 1 Board remand in actions against ALJs; 1 informal hearing in a proposed SES removal. (In SES removal cases, a report is issued but there is no decision by an ALJ or the Board.)
- 5 Includes 3 cases reopened by the Board on its own motion and 6 cases where OPM requested reconsideration.
- 6 Final Board decisions. Case type breakdown: 2 OSC stay requests, 1 Hatch Act case, 1 PFR in a Hatch Act case, 8 PFRs in actions against ALJs, 1 PFR on a request for an attorney fee award in an action against an ALJ, and 9 requests for regulation review.
- 7 In addition to the 1,174 cases closed by the Board with a decision or order, there were 3 interlocutory appeals decided by the Board in FY 2003. Interlocutory appeals typically raise difficult issues or issues not previously addressed by the Board.

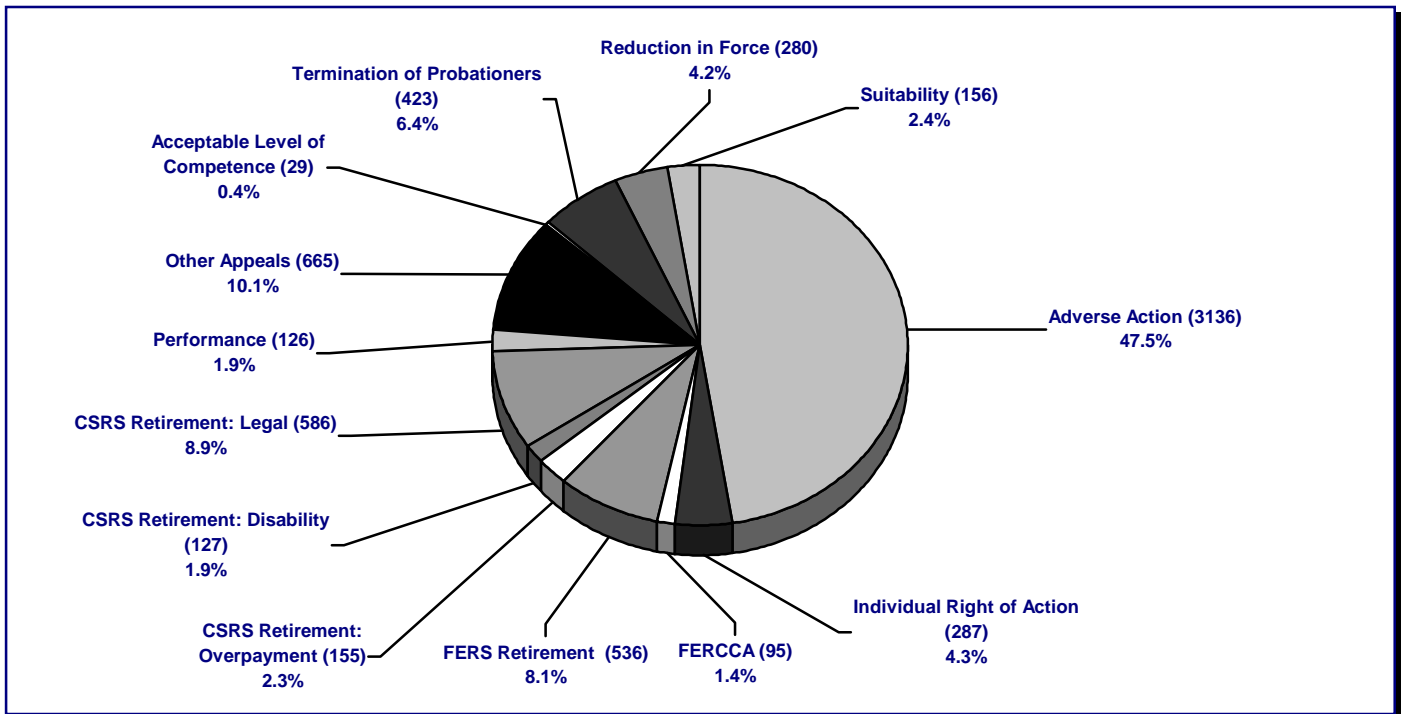
## REGIONAL CASE PROCESSING – FY 2003

DISPOSITION OF APPEALS DECIDED IN FY 2003 BY TYPE OF CASE									
Type of Case	Decided	Dismissed		Not Dismissed		Settled		Adjudicated	
Adverse Action by Agency	3136	1416	45%	1720	55%	1160	67%	560	33%
Termination of Probationers	423	372	88%	51	12%	41	80%	10	20%
Reduction in Force	280	181	65%	99	35%	34	34%	65	66%
Performance	126	38	30%	88	70%	65	74%	23	26%
Acceptable Level of Competence (WIGI)	29	11	38%	18	62%	14	78%	4	22%
Suitability	156	40	26%	116	74%	82	71%	34	29%
CSRS Retirement: Legal	586	255	44%	331	56%	14	4%	317	96%
CSRS Retirement: Disability	127	58	46%	69	54%	5	7%	64	93%
CSRS Retirement: Overpayment	155	61	39%	94	61%	49	52%	45	48%
FERS Retirement	536	184	34%	352	66%	144	41%	208	59%
FERCCA	95	55	58%	40	42%	2	5%	38	95%
Individual Right of Action	287	191	67%	96	33%	50	52%	46	48%
Other	665	588	88%	77	12%	41	53%	36	47%
<b>Total</b>	<b>6601</b>	<b>3450</b>	<b>52%</b>	<b>3151</b>	<b>48%</b>	<b>1701</b>	<b>54%</b>	<b>1450</b>	<b>46%</b>

**Dismissed** and **Not Dismissed** columns are percentages of **Decided** column.

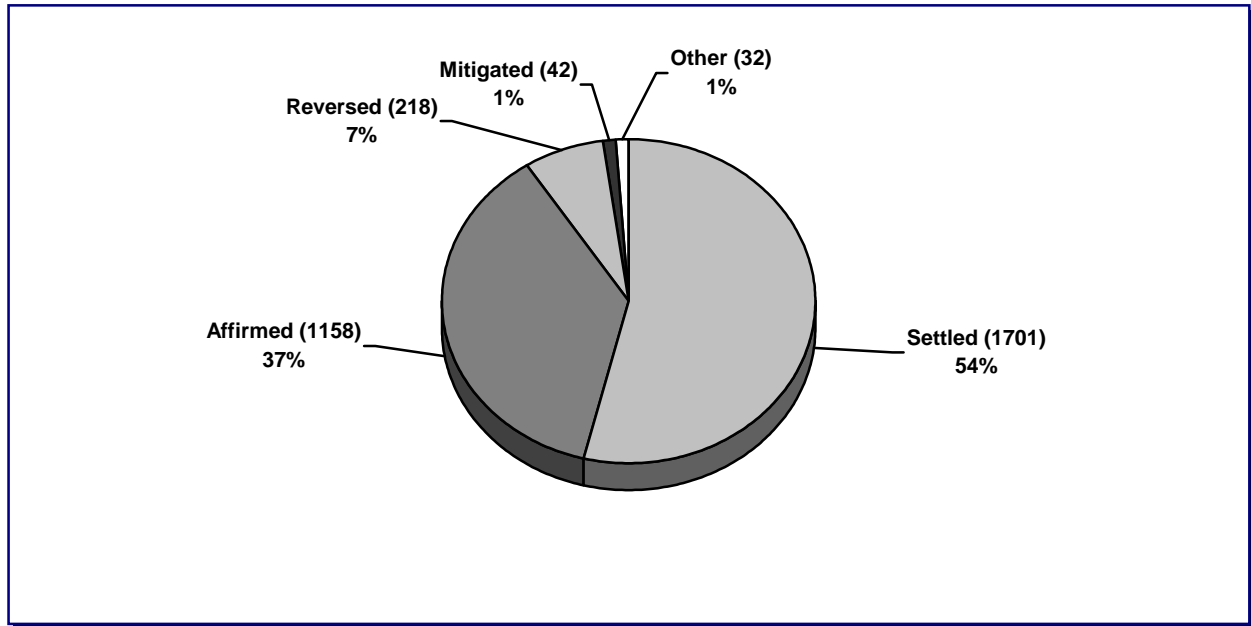
**Settled** and **Adjudicated** columns are percentages of **Not Dismissed** column.

## TYPES OF APPEALS DECIDED IN FY 2003



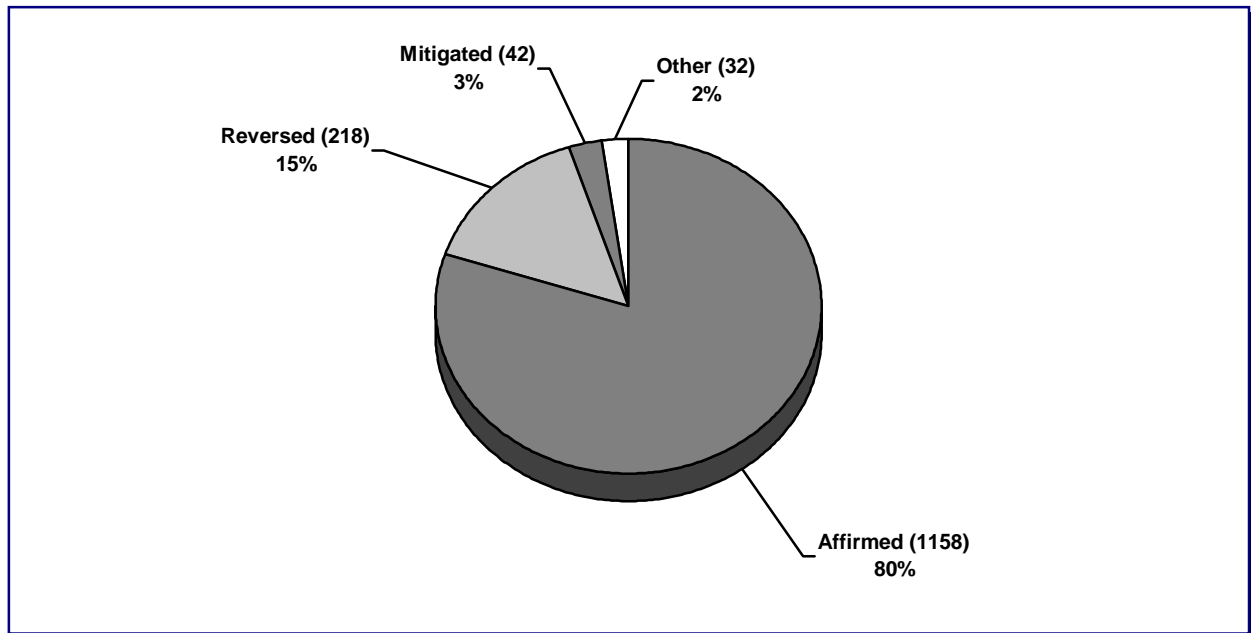
Total Number of Appeals: 6,601  
(Percentages do not total 100 because of rounding)

**DISPOSITION OF APPEALS IN FY 2003  
THAT WERE NOT DISMISSED**



Total Number of Appeals that were Not Dismissed: 3,151

**DISPOSITION OF APPEALS ADJUDICATED ON THE MERITS  
(i.e., Not Dismissed or Settled) IN FY 2003**



Based on 1,450 appeals adjudicated on the merits

APPEALS DECIDED IN FY 2003 BY AGENCY									
	Decided	Dismissed <sup>1</sup>		Not Dismissed <sup>1</sup>		Settled <sup>2</sup>		Adjudicated <sup>2</sup>	
US Postal Service	1447	862	59.6%	585	40.4%	396	67.7%	189	32.3%
Office, Personnel Mgmt*	1414	542	38.3%	872	61.7%	230	26.4%	642	73.6%
Veterans Affairs	534	300	56.2%	234	43.8%	179	76.5%	55	23.5%
Army	419	234	55.8%	185	44.2%	112	60.5%	73	39.5%
Navy	389	212	54.5%	177	45.5%	104	58.8%	73	41.2%
Justice	380	211	55.5%	169	44.5%	110	65.1%	59	34.9%
Defense	306	171	55.9%	135	44.1%	67	49.6%	68	50.4%
Treasury	303	167	55.1%	136	44.9%	89	65.4%	47	34.6%
Air Force	242	122	50.4%	120	49.6%	70	58.3%	50	41.7%
Agriculture	215	112	52.1%	103	47.9%	69	67.0%	34	33.0%
Interior	191	83	43.5%	108	56.5%	67	62.0%	41	38.0%
Transportation	146	98	67.1%	48	32.9%	19	39.6%	29	60.4%
Homeland Security	122	81	66.4%	41	33.6%	33	80.5%	8	19.5%
Health & Human Serv	73	33	45.2%	40	54.8%	31	77.5%	9	22.5%
Social Security Adm	69	35	50.7%	34	49.3%	26	76.5%	8	23.5%
Labor	45	26	57.8%	19	42.2%	13	68.4%	6	31.6%
General Service Adm	38	26	68.4%	12	31.6%	8	66.7%	4	33.3%
Commerce	35	22	62.9%	13	37.1%	10	76.9%	3	23.1%
Energy	34	15	44.1%	19	55.9%	16	84.2%	3	15.8%
Housing & Urban Dev	28	16	57.1%	12	42.9%	6	50.0%	6	50.0%
Smithsonian Inst	17	3	17.6%	14	82.4%	12	85.7%	2	14.3%
EPA	15	9	60.0%	6	40.0%	2	33.3%	4	66.7%
FDIC	15	5	33.3%	10	66.7%	0	.0%	10	100.0%
NASA	12	7	58.3%	5	41.7%	2	40.0%	3	60.0%
EEOC	11	7	63.6%	4	36.4%	3	75.0%	1	25.0%
State	9	4	44.4%	5	55.6%	2	40.0%	3	60.0%
Adm Office of US Courts	7	5	71.4%	2	28.6%	0	.0%	2	100.0%
NARA	7	2	28.6%	5	71.4%	4	80.0%	1	20.0%
SBA	7	2	28.6%	5	71.4%	4	80.0%	1	20.0%
Education	6	0	.0%	6	100.0%	3	50.0%	3	50.0%
Corp for National & Community Service	5	3	60.0%	2	40.0%	1	50.0%	1	50.0%
GPO	5	2	40.0%	3	60.0%	2	66.7%	1	33.3%
Securities & Exchange Com	5	3	60.0%	2	40.0%	2	100.0%	0	.0%
TVA	5	4	80.0%	1	20.0%	0	.0%	1	100.0%
Other	4	4	100.0%	0	.0%	0	.0%	0	.0%



APPEALS DECIDED IN FY 2003 BY AGENCY (continued)										
	Decided		Dismissed <sup>1</sup>		Not Dismissed <sup>1</sup>		Settled <sup>2</sup>		Adjudicated <sup>2</sup>	
Armed Forces Retirement Home	3	3	100.0%	0	.0%	0	.0%	0	.0%	
Broadcasting Board of Governors	3	2	66.7%	1	33.3%	1	100.0%	0	.0%	
FEMA	3	0	.0%	3	100.0%	1	33.3%	2	66.7%	
Nuclear Regulatory Com	3	1	33.3%	2	66.7%	2	100.0%	0	.0%	
Boundary & Water Com: US/MEX	2	1	50.0%	1	50.0%	0	.0%	1	100.0%	
CIA	2	2	100.0%	0	.0%	0	.0%	0	.0%	
Court Serv & Offend Super Agency for DC	2	0	.0%	2	100.0%	1	50.0%	1	50.0%	
National Credit Union Adm	2	0	.0%	2	100.0%	0	.0%	2	100.0%	
NLRB	2	0	.0%	2	100.0%	0	.0%	2	100.0%	
Peace Corps	2	1	50.0%	1	50.0%	0	.0%	1	100.0%	
Architect of the Capitol	1	1	100.0%	0	.0%	0	.0%	0	.0%	
Bd for International Broadcasting	1	0	.0%	1	100.0%	1	100.0%	0	.0%	
Export/Import Bank of US	1	0	.0%	1	100.0%	0	.0%	1	100.0%	
Farm Credit Adm	1	1	100.0%	0	.0%	0	.0%	0	.0%	
Fed Housing Finance Bd	1	0	.0%	1	100.0%	1	100.0%	0	.0%	
Fed Trade Comm	1	1	100.0%	0	.0%	0	.0%	0	.0%	
Gov of the District of Columbia	1	1	100.0%	0	.0%	0	.0%	0	.0%	
Library of Congress	1	1	100.0%	0	.0%	0	.0%	0	.0%	
National Science Foundation	1	1	100.0%	0	.0%	0	.0%	0	.0%	
National Transportation Safety Bd	1	1	100.0%	0	.0%	0	.0%	0	.0%	
National Foundation for Arts & Humanities	1	0	.0%	1	100.0%	1	100.0%	0	.0%	
Office of Administration	1	1	100.0%	0	.0%	0	.0%	0	.0%	
Office of Special Counsel	1	0	.0%	1	100.0%	1	100.0%	0	.0%	
Panama Canal Comm	1	1	100.0%	0	.0%	0	.0%	0	.0%	
Presidio Trust	1	1	100.0%	0	.0%	0	.0%	0	.0%	
US International Development Agency	1	1	100.0%	0	.0%	0	.0%	0	.0%	
US International Trade Comm	1	1	100.0%	0	.0%	0	.0%	0	.0%	
TOTAL	6601	3450	52.3%	3151	47.7%	1701	54.0%	1450	46.0%	

\* Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the administrator of the Civil Service Retirement System and the Federal Employees Retirement System.

<sup>1</sup> Percentages in columns "Dismissed" and "Not Dismissed" are of "Decided."

<sup>2</sup> Percentages in columns "Settled" and "Adjudicated" are of "Not Dismissed."

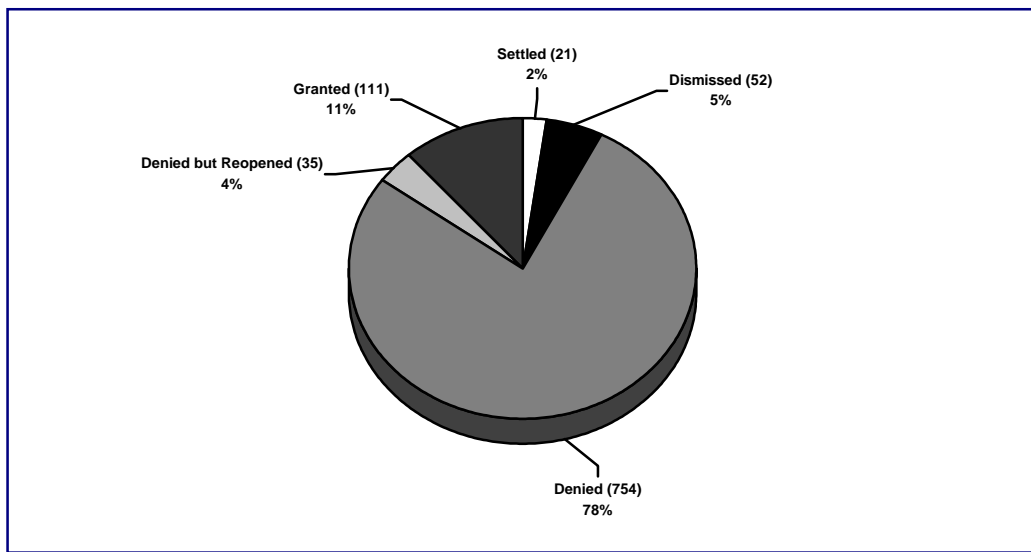
APPEALS ADJUDICATED* IN FY 2003 BY AGENCY										
	Adjudicated		Affirmed		Reversed		Mitigated Modified		Other	
US Postal Service	189	154	81.5%	23	12.2%	12	6.3%	0	.0%	
Office, Personnel Mgmt	642	474	73.8%	140	21.8%	3	.5%	25	3.9%	
Veterans Affairs	55	43	78.2%	9	16.4%	3	5.5%	0	.0%	
Army	73	61	83.6%	9	12.3%	3	4.1%	0	.0%	
Navy	73	66	90.4%	6	8.2%	1	1.4%	0	.0%	
Justice	59	47	79.7%	7	11.9%	3	5.1%	2	3.4%	
Defense	68	60	88.2%	5	7.4%	2	2.9%	1	1.5%	
Treasury	47	41	87.2%	2	4.3%	4	8.5%	0	.0%	
Air Force	50	45	90.0%	2	4.0%	3	6.0%	0	.0%	
Agriculture	34	26	76.5%	7	20.6%	1	2.9%	0	.0%	
Interior	41	35	85.4%	3	7.3%	3	7.3%	0	.0%	
Transportation	29	28	96.6%	1	3.4%	0	.0%	0	.0%	
Homeland Security	8	3	37.5%	1	12.5%	1	12.5%	3	37.5%	
Health & Human Serv	9	7	77.8%	0	.0%	2	22.2%	0	.0%	
Social Security Adm	8	7	87.5%	0	.0%	0	.0%	1	12.5%	
Labor	6	4	66.7%	2	33.3%	0	.0%	0	.0%	
General Service Adm	4	4	100.0%	0	.0%	0	.0%	0	.0%	
Commerce	3	3	100.0%	0	.0%	0	.0%	0	.0%	
Energy	3	3	100.0%	0	.0%	0	.0%	0	.0%	
Housing & Urban Dev	6	5	83.3%	1	16.7%	0	.0%	0	.0%	
Smithsonian Inst	2	2	100.0%	0	.0%	0	.0%	0	.0%	
EPA	4	4	100.0%	0	.0%	0	.0%	0	.0%	
FDIC	10	10	100.0%	0	.0%	0	.0%	0	.0%	
NASA	3	3	100.0%	0	.0%	0	.0%	0	.0%	
EEOC	1	1	100.0%	0	.0%	0	.0%	0	.0%	
State	3	3	100.0%	0	.0%	0	.0%	0	.0%	
Adm Office of US Courts	2	2	100.0%	0	.0%	0	.0%	0	.0%	
NARA	1	1	100.0%	0	.0%	0	.0%	0	.0%	
SBA	1	0	.0%	0	.0%	1	100.0%	0	.0%	
Education	3	3	100.0%	0	.0%	0	.0%	0	.0%	
Corp for National & Community Service	1	1	100.0%	0	.0%	0	.0%	0	.0%	
GPO	1	1	100.0%	0	.0%	0	.0%	0	.0%	
TVA	1	1	100.0%	0	.0%	0	.0%	0	.0%	
FEMA	2	2	100.0%	0	.0%	0	.0%	0	.0%	
Boundary & Water Com: US/MEX	1	1	100.0%	0	.0%	0	.0%	0	.0%	
Court Serv & Offend Super Agency For DC	1	1	100.0%	0	.0%	0	.0%	0	.0%	
National Credit Union Adm	2	2	100.0%	0	.0%	0	.0%	0	.0%	
NLRB	2	2	100.0%	0	.0%	0	.0%	0	.0%	
Peace Corps	1	1	100.0%	0	.0%	0	.0%	0	.0%	
Export - Import Bank of US	1	1	100.0%	0	.0%	0	.0%	0	.0%	
<b>TOTAL</b>	<b>1450</b>	<b>1158</b>	<b>79.9%</b>	<b>218</b>	<b>15.0%</b>	<b>42</b>	<b>2.9%</b>	<b>32</b>	<b>2.2%</b>	
Percentages may not total 100 because of rounding.										

\* ADJUDICATED means adjudicated on the merits, i.e., not dismissed or settled.

## HEADQUARTERS CASE PROCESSING – FY 2003

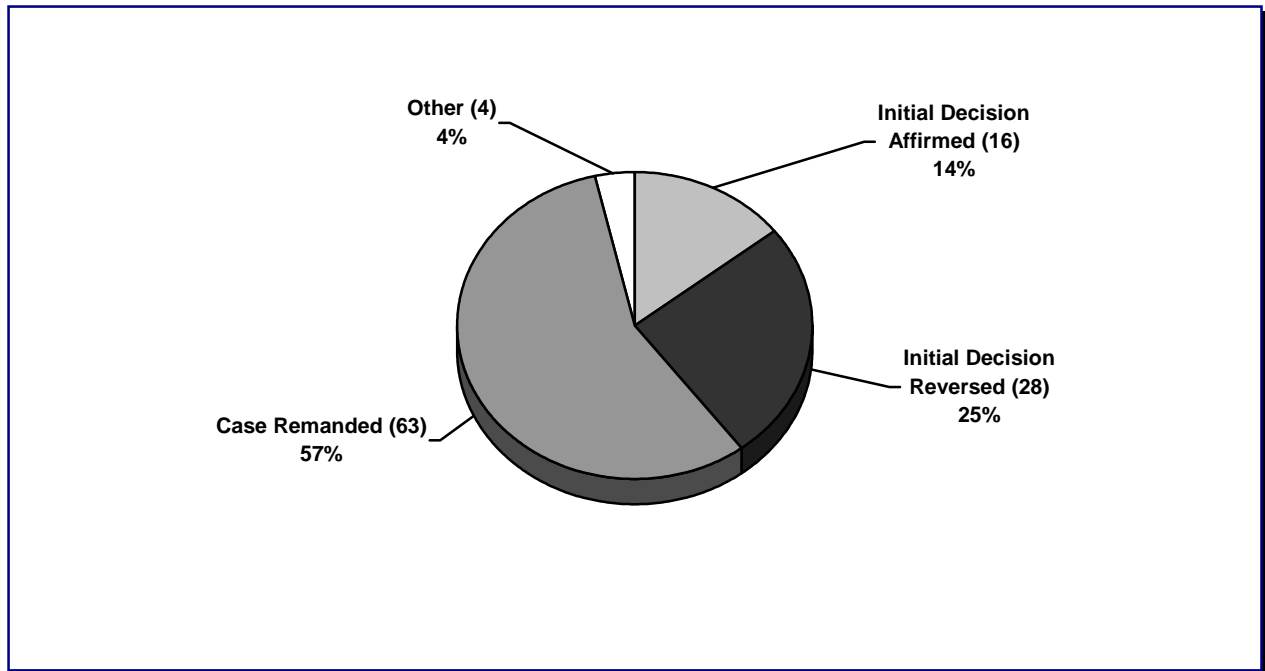
DISPOSITION OF PETITIONS FOR REVIEW OF INITIAL DECISIONS ON APPEALS  
DECIDED IN FY 2003 BY TYPE OF CASE

Type of Case	Decided	Dismissed	Settled	Denied	Denied Reopened	Granted
Adverse Action by Agency	469	18 3.8%	13 2.8%	380 81.0%	10 2.1%	48 10.2%
Termination of Probationers	39	2 5.1%	0 .0%	37 94.9%	0 .0%	0 .0%
Reduction in Force	38	3 7.9%	0 .0%	26 68.4%	1 2.6%	8 21.0%
Performance	19	0 .0%	1 5.3%	17 89.5%	0 .0	1 5.3%
Acceptable Level of Competence (WIGI)	4	0 .0%	0 .0%	3 75.0%	1 25.0%	0 .0%
Suitability	17	1 5.9%	1 5.9	10 58.8%	2 11.8%	3 17.6%
CSRS Retirement: Legal	86	5 5.8%	1 1.2%	60 69.8%	3 3.5%	17 19.8%
CSRS Retirement: Disability	32	1 3.1%	0 .0%	28 87.5%	0 .0%	3 9.4%
CSRS Retirement: Overpayment	20	2 10.0%	1 5.0%	12 60.0%	0 .0%	5 25.0%
FERS Retirement	58	6 10.3%	1 1.7%	43 74.1%	4 6.9%	4 6.9%
FERCCA	2	0 .0%	0 .0%	2 100.0%	0 .0%	0 .0%
Individual Right of Action	80	6 7.5%	2 2.5%	55 68.8%	8 10.0%	9 11.2%
Other	109	8 7.3%	1 .9%	81 74.3%	6 5.5%	13 11.9%
<b>Total</b>	<b>973</b>	<b>52 5.3%</b>	<b>21 2.2%</b>	<b>754 77.5%</b>	<b>35 3.6%</b>	<b>111 11.4%</b>

DISPOSITION OF PETITIONS FOR REVIEW OF INITIAL DECISIONS ON APPEALS  
DECIDED IN FY 2003

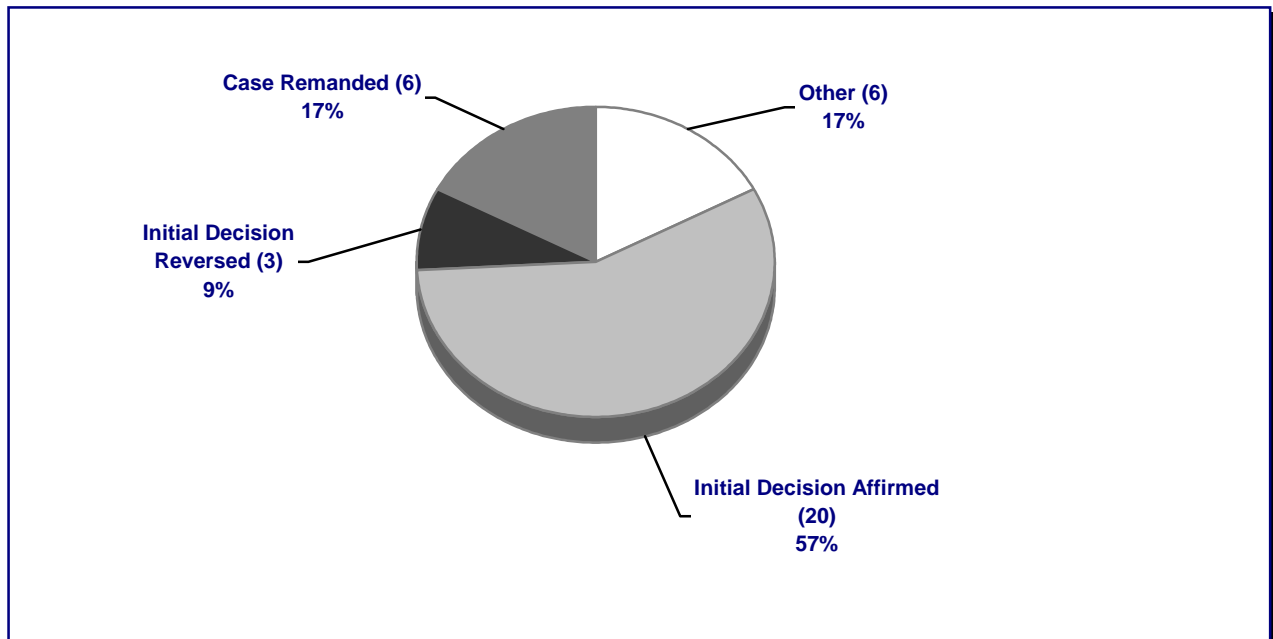
Total Number of Petitions for Review: 973

**DISPOSITION OF PETITIONS FOR REVIEW OF INITIAL DECISIONS ON APPEALS  
GRANTED IN FY 2003**



Based on 111 Petitions for Review Granted

**DISPOSITION OF PETITIONS FOR REVIEW OF INITIAL DECISIONS ON APPEALS  
DENIED BUT REOPENED IN FY 2003**



Based on 35 Petitions for Review Denied But Reopened

PETITIONS FOR REVIEW DECIDED IN FY 2003 BY AGENCY											
	Decided	Dismissed		Settled		Denied		Denied Reopened		Granted	
US Postal Service	211	14	6.6%	1	.5%	161	76.3%	8	3.8%	27	12.8%
Office, Personnel Mgmt*	192	14	7.3%	2	1.0%	144	75.0%	4	2.1%	28	14.6%
Veterans Affairs	82	3	3.7%	3	3.7%	60	73.2%	7	8.5%	9	11.0%
Army	70	6	8.6%	1	1.4%	54	77.1%	2	2.9%	7	10.0%
Navy	61	1	1.6%	0	.0%	55	90.2%	2	3.3%	3	4.9%
Defense	54	2	3.7%	2	3.7%	44	81.5%	0	.0%	6	11.1%
Justice	51	5	9.8%	2	3.9%	35	68.6%	5	9.8%	4	7.8%
Treasury	49	3	6.1%	1	2.0%	38	77.6%	2	4.1%	5	10.2%
Air Force	30	0	.0%	1	3.3%	26	86.7%	0	.0%	3	10.0%
Transportation	27	1	3.7%	2	7.4%	21	77.8%	1	3.7%	2	7.4%
Interior	24	0	.0%	2	8.3%	19	79.2%	0	.0%	3	12.5%
Health & Human Serv	17	0	.0%	1	5.9%	10	58.8%	0	.0%	6	35.3%
Agriculture	15	1	6.7%	0	.0%	11	73.3%	1	6.7%	2	13.3%
Social Security Adm	14	0	.0%	1	7.1%	12	85.7%	0	.0%	1	7.1%
Commerce	11	0	.0%	0	.0%	10	90.9%	0	.0%	1	9.1%
General Service Adm	11	0	.0%	1	9.1%	9	81.8%	0	.0%	1	9.1%
Housing & Urban Dev	7	0	.0%	0	.0%	6	85.7%	0	.0%	1	14.3%
Labor	7	0	.0%	0	.0%	7	100.0%	0	.0%	0	.0%
NASA	5	0	.0%	0	.0%	4	80.0%	1	20.0%	0	.0%
Boundary & Water Comm: US/MEX	3	0	.0%	0	.0%	3	100.0%	0	.0%	0	.0%
Energy	3	0	.0%	0	.0%	3	100.0%	0	.0%	0	.0%
SBA	3	0	.0%	0	.0%	2	66.7%	1	33.3%	0	.0%
TVA	3	0	.0%	0	.0%	2	66.7%	0	.0%	1	33.3%
Corp for National & Community Serv	2	0	.0%	0	.0%	2	100.0%	0	.0%	0	.0%
EPA	2	0	.0%	1	50.0%	1	50.0%	0	.0%	0	.0%

**PETITIONS FOR REVIEW DECIDED IN FY 2003 BY AGENCY**  
**(continued)**

	Decided		Dismissed		Settled		Denied		Denied Reopened		Granted	
EEOC	2	0	.0%	0	.0%	2	100.0%	0	.0%	0	.0%	
GPO	2	1	50.0%	0	.0%	1	50.0%	0	.0%	0	.0%	
Architect of the Capitol	1	0	.0%	0	.0%	1	100.0%	0	.0%	0	.0%	
CIA	1	0	.0%	0	.0%	1	100.0%	0	.0%	0	.0%	
Court Serv & Offend Super Agency for DC	1	0	.0%	0	.0%	1	100.0%	0	.0%	0	.0%	
Education	1	1	100.0%	0	.0%	0	.0%	0	.0%	0	.0%	
FCC	1	0	.0%	0	.0%	1	100.0%	0	.0%	0	.0%	
FDIC	1	0	.0%	0	.0%	1	100.0%	0	.0%	0	.0%	
Federal Housing Finance Bd	1	0	.0%	0	.0%	1	100.0%	0	.0%	0	.0%	
Federal Mediation & Conciliation Serv	1	0	.0%	0	.0%	0	.0%	1	100.0%	0	.0%	
Government of DC	1	0	.0%	0	.0%	1	100.0%	0	.0%	0	.0%	
National Credit Union Adm	1	0	.0%	0	.0%	1	100.0%	0	.0%	0	.0%	
NLRB	1	0	.0%	0	.0%	1	100.0%	0	.0%	0	.0%	
Nuclear Regulatory Com	1	0	.0%	0	.0%	1	100.0%	0	.0%	0	.0%	
Peace Corps	1	0	.0%	0	.0%	1	100.0%	0	.0%	0	.0%	
Railroad Retirement Bd	1	0	.0%	0	.0%	0	.0%	0	.0%	1	100.0%	
Smithsonian Inst	1	0	.0%	0	.0%	1	100.0%	0	.0%	0	.0%	
TOTAL	973	52	5.3%	21	2.2%	754	77.5%	35	3.6%	111	11.4%	

Percentages may not total 100 because of rounding.

\* Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the administrator of the Civil Service Retirement System and the Federal Employees Retirement System.

## **SUMMARY OF THE MERIT SYSTEMS STUDIES FUNCTION FOR FY 2003**

### **Help Wanted: A Review of Federal Vacancy Announcements**

Federal agencies posted over 150,000 vacancy announcements in FY 2001, more than half of which were open to external applicants. Because many of the jobs were open to external applicants who are unfamiliar with the Government's hiring system, it is particularly important that vacancy announcements be an effective hiring tool. This report was based on a review of a random sample of 10,000 vacancy announcements posted on USAJOBS in FY 2001 and an assessment of a random sample of 100 vacancy announcements posted on March 6 and 7, 2002.

The MSPB review of the quality of vacancy announcements, unfortunately, shows that they are generally not good recruiting tools. They read poorly, are unattractive and describe the jobs in a bureaucratic way, making it difficult to determine what the person would be doing in the job. Minimum qualifications are not specific, leaving applicants to wonder what exactly is required to qualify. Many vacancy announcements used language that is sometimes negative and threatening, or that can insult many applicants or deter them from applying. The MSPB review also showed that agencies often impose burdensome requirements on applicants and that their instructions on how to apply are frequently vague.

The most significant of the study's findings is that many of the problems identified are actually symptoms of other, more complicated problems faced by the Government's staffing system. The poor quality of vacancy announcements suggests that agencies lack a comprehensive recruiting and assessment strategy to ensure that they make good selections. The lack of such a strategy is compounded by agency human resources professionals' lack of expertise, especially in recruiting. The report offers recommendations that would help resolve these problems.

### **The Federal Selection Interview: Unrealized Potential**

Structured interviews are twice as effective as unstructured interviews in predicting on-the-job performance. In a structured interview, all questions are related to the job to be filled, and the same questions are asked of each candidate for the job. Selecting the wrong person for a Federal job can cost many thousands of dollars, estimated at up to three times the employee's annual salary. According to an MSPB survey, 95 percent of Federal supervisors say they rely on interviews to a "great" or "moderate" extent when making a selection.

Because selection interviews are widely used and influential, it is important that they be used effectively. The report recommended that agencies use structured interviews to assess candidates for Federal jobs. Agencies should decide in advance what purpose an interview is to serve and then design and conduct the interview accordingly. The report also recommended that agencies invest the resources needed to add structure to their selection interviews and that they evaluate their interview practices for effectiveness and possible improvement.

## **The Federal Workforce for the 21<sup>st</sup> Century: Results of the Merit Principles Survey 2000**

This report summarized the views of Federal employees before 9/11 and noted that delayed retirements, an improving economy, and increases in job opportunities may exacerbate skill gaps already evident as a result of the downsizing in the 1990s. While employees still believe they and their work units are highly productive, overall job satisfaction appears to be slipping and frustrations are evident in many of their survey responses. For example, respondents planning to retire in the coming year said that excessive job stress was the most important *work-related* factor in their decision to retire.

In other areas, employees expressed concerns about some aspects of their supervision and reported experiencing negative personnel management practices. Analyses show that views of satisfied employees differ markedly in a variety of ways from those of dissatisfied employees and that perceptions of discrimination vary notably by race and national origin.

The report made a number of recommendations for agencies to address the issues uncovered. Agencies should ensure that managers closely monitor and address any skill imbalances in their strategic plans, that supervisors have both the ability and the desire to manage effectively and fairly, and that their organizations foster a culture where poor performance is dealt with and where employees can work freely and without fear of reprisal for exercising their appeal rights or reporting waste, fraud or abuse.

### ***Issues of Merit Newsletter***

Through the quarterly newsletter *Issues of Merit*, the MSPB publicizes findings from current studies on a wide range of human capital issues. In FY 2003, newsletter topics included:

- Commentary on issues of broad applicability, such as understanding the merit principles as the Government's core values, the need to take organizational culture seriously, and reflection on the Civil Service Reform Act's 25th anniversary;
- Advocacy on specific reform efforts, such as support for Recruitment One-Stop, changing the appeal process to fix the problem of poor performers, and the arrival of category rating;
- Practical advice for human resources specialists and managers, such as how to fire poor performers, how to use competencies competently, how to include multiple hurdles to make better selection decisions, and how to write better vacancy announcements;
- Analysis of MSPB and other research, such as knowing more about the Contracting Officers Representatives (CORs) who provide day-to-day oversight of Government contracts, as well as understanding human resources reforms in the states and what it means for the Federal Government; and
- Informational articles to help readers understand critical topics, such as MSPB appeals, pay flexibilities available under Title 5, and what pay banding looks like in the Federal Government.



## **SIGNIFICANT ACTIONS OF THE OFFICE OF PERSONNEL MANAGEMENT**

As required by statute, MSPB reports on the significant actions of the Office of Personnel Management (OPM). The Board has met this reporting requirement in previous years through the evaluation, assessment and publication of merit systems studies through our Office of Policy and Evaluation (OPE). For this report, we reviewed and analyzed the significance of current actions with the greatest long-term implications for the Federal civil service.

### **Leadership in the design of the alternative personnel systems for the Department of Homeland Security and the Department of Defense**

OPM is working with DHS and DOD as authorized by statute to design their new civilian personnel systems to be established under regulations issued jointly by the Secretaries of Homeland Security and Defense and the Director of OPM. OPM also published, in draft, guiding principles for civil service transformation that foresee significant changes, including greater agency flexibility. Those principles include preservation of the merit system principles.

**Significance:** OPM recognizes and anticipates that alternative agency-specific systems may be created within or outside Title 5, and is laying the groundwork for this possibility.

### **Broader focus on agency human capital management**

As the lead agency for the human capital component of the President's Management Agenda, OPM worked with agencies on the development of human capital plans and established "standards for success" for agency human capital management.

**Significance:** This is a significant change in OPM's oversight of agency human resource management. This oversight approach is broader and more continuous than past approaches.

### **Leadership in electronic Government initiatives**

OPM led several electronic government ("e-Gov") initiatives. One such initiative is Recruitment One-Stop (ROS), a policy and technology platform for advertising Federal job vacancies and matching job seekers to job opportunities. Under this initiative, OPM plans to establish standards for the format of vacancy announcements, a basic employment application, and applicant feedback. OPM also led the Enterprise Human Resources Integration (EHRI) e-Government initiative, completing the EHRI design and issuing a prototype demonstrating some of the system's functions.

**Significance:** ROS, in conjunction with agency-level improvements, could lead to material improvement in the application process and the treatment of job applicants. EHRI is a long-term initiative; full functionality is not yet available. However, EHRI should greatly increase the availability and quality of information about the Federal workforce and how it is managed.

### **Oversight actions to assure agency compliance with law and regulations**

OPM actions to assure agency compliance with law and regulation included:

- Audit of 96 agency delegated examining units (agency organizations that OPM has authorized to examine and refer applicants for jobs in the competitive service);
- An audit of selected issues at the Department of Homeland Security, Transportation Security Administration; and
- Working with agencies to establish accountability systems (internal mechanisms to ensure proper use of human resource management authorities).

OPM reports that delegated authorities are generally used properly, that agencies take corrective action when required, and 14 of the largest Federal agencies now have accountability systems.

**Significance:** OPM is responsible for ensuring that agencies comply with civil service law and regulation and that agencies properly exercise OPM-delegated authorities. OPM is encouraging agencies to take greater responsibility for self-monitoring, while retaining the capacity to review agency decisions and direct corrective action when necessary.

### **Role in increasing the scope of Governmentwide efforts to identify and develop candidates for leadership positions in the Federal Government**

OPM has established the Senior Executive Service Federal Candidate Development Program, a program designed to create a Governmentwide pool of candidates for SES positions. OPM has also made significant changes to the former Presidential Management Intern (PMI) program. The program has been expanded to include a Senior Fellows program that provides high-level opportunities, and has been renamed the Presidential Management Fellows Program.

**Significance:** These actions greatly increase the scope of Governmentwide efforts to identify and develop candidates for leadership positions in the Federal government. Until now, there was no Governmentwide effort to develop candidates for the Senior Executive service or to place qualified individuals in positions at the levels immediately below the Senior Executive Service.

### **Support for development of pay-for-performance remuneration systems**

OPM has advocated reforming Federal employee pay to make pay less dependent on position and tenure and more reflective of individual performance. OPM has developed and supported Administration proposals that would allow agencies to give performance-based pay increases to members of the Senior Executive Service and employees paid under the General Schedule.

**Significance:** These reforms could substantially increase agency discretion in managing employee salaries and rewarding high performance. Fair, credible performance management systems will be critical to the success of these reforms.

## **FISCAL YEAR 2003 FINANCIAL SUMMARY**

(dollars in thousands)

### **Financial Sources**

Appropriations	\$31,819
Civil Service Retirement and Disability Trust Fund	2,609
<b>Total Revenue</b>	<b>\$34,428</b>

### **Obligations Incurred**

Personnel Compensation	\$21,120
Personnel Benefits	4,296
Travel of Persons	551
Transportation of Things	88
Rental Payments	3,047
Communications, Utilities, and Miscellaneous	355
Printing and Reproduction	101
Other Services	3,802
Supplies and Materials	372
Equipment	544
<b>Total Obligations Incurred</b>	<b>\$34,276</b>

<b>Obligated Balance</b>	<b>\$152</b>
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## **FOR ADDITIONAL INFORMATION**

The MSPB website contains information about the Board and its functions, where to file an appeal, and how the Board's adjudicatory process works.

At the website, you can get Board regulations, appeal and PFR forms, important telephone and FAX numbers, and e-mail addresses for the headquarters, regional, and field offices.

Complete decisions from July 1, 1994, and significant precedential decisions issued from 1979 to 1994 are available for downloading. The website also provides weekly Case Summaries—an easy way to keep up with changes in Board case law.

From the website, you can download recent Board reports and special studies on civil service issues.

You can also subscribe to one of two list servers (listservs) on the website—one to receive Board decisions as they are posted, and the other to receive notification when a merit systems studies report is issued.

The Board's website is

**<http://www.mspb.gov>**

The Board's toll-free telephone number is **1-800-209-8960**.